

July 11, 2014

Ms. Cruz Ramos
City Manager
City of San Joaquin
P O BOX 758
San Joaquin, CA 93660

Re: Your Request for Advice
Our File No. A-14-105

Dear Ms. Ramos:

This letter responds to your request for advice on behalf of Mayor Amarpreet Dhaliwal regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Government Code Section 1090 (“Section 1090”). Please note that we do not provide advice on other conflict of interest restrictions, if any, that could arise such as those governed by the common law. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are accurate.

After forwarding your request to the Attorney General’s Office and the Fresno County District Attorney’s Office, we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

Importantly, we do not advise on past conduct. (Regulation 18329(b)(8); Section 1097.1(c)(2).) This advice is therefore not intended to apply to any conduct that might have already taken place.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

QUESTION

Does either Section 1090 or the Act prevent the City of San Joaquin from purchasing from the Mayor's hardware store in emergency situations?

CONCLUSION

No. Neither Section 1090 nor the Act prevents the city from making such purchases, but under both laws, the Mayor has a disqualifying conflict of interest preventing him from participating in the decisions.

FACTS

You are the City Manager for the City of San Joaquin. San Joaquin is a small city in Fresno County with a population of just over 4,000 and a land area of about one square mile. San Joaquin has one local hardware store and is just under an hour's drive from the closest hardware store in Fresno.

The City of San Joaquin has purchased hardware and other sundry supplies from Harralson's, a local hardware store in San Joaquin, for 30 years or more. In March of 2014, Mayor Dhaliwal purchased Harralson's.

The City also has contracts with large hardware stores such as Home Depot for bulk or planned purchases. Any purchase of \$300 and over also requires three quotes and approval by the city manager or the assistant city manager. Buying from Harralson's occurs in cases of emergencies when an item is needed right away, but is not within the City's inventory. An example of such an emergency situation would be a malfunction of the City's well system, which provides water services to all residents and businesses in San Joaquin. If the City does not have a particular part or tool in such an emergency situation and Harralson's can provide it instead of causing unnecessary (and at times dangerous) delay by driving nearly an hour to the next closest hardware store, city officials act in the best interest of the populace and purchase from Harralson's.

ANALYSIS

Your questions raise potential issues under both the standard conflict of interest provisions set forth in Section 87100 of the Act and Section 1090's specific prohibition against public officials making contracts in which they are financially interested. Because our conclusion under Section 1090 requires the Mayor to recuse himself from any decision regarding the hardware store, we do not need analyze the same facts under the Act, which would not have any additional or separate effect.

Conflicts of Interest Under Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We employ the following six-step analysis to determine whether Mayor Dhaliwal has a conflict of interest under Section 1090.

Step One: Is Mayor Dhaliwal subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by anybody or board of which they are members.” City councils and their members are plainly covered by this prohibition. (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.) Therefore, the Mayor is subject to the provisions of Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);² 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) A decision to modify, extend or renegotiate a contract constitutes involvement in the making of a contract under Section 1090. (See *City of Imperial Beach, supra*, 103 Cal.App.3d at p. 197.)

² It is noteworthy to point out that opinions issued by the Attorney General’s Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17), especially where, as here, it has regularly provided advice concerning a particular area of law. (*Thorpe v. Long Beach Community College Dist.*, (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

Here, the city enters agreements for purchases with Harralson's, which are contracts under Section 1090.

Step Three: Is Mayor Dhaliwal making or participating in making a contract?

As a member of the San Joaquin City Council, which must approve any warrants issued to city vendors, Mayor Dhaliwal would be participating in the making of a contract.

Step Four: Does the Mayor have a financial interest in the contract?

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest" (*People v. Honig, supra*, at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 nowhere specifically defines the term "financial interest," case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

As the owner of the hardware store from which the city would make purchases, Mayor Dhaliwal clearly has a financial interest in the income of that store.

Step Five: Does either a remote interest or non-interest exception apply?

As a general rule, when Section 1090 is applicable to one member of a governing body of a public entity, as here, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5.

Even so, there is no statutory remote interest or non-interest exception that applies to the type of situation here, where a business owner who contracts with the city is also the mayor.

Step Six: Does the Rule of Necessity Apply?

In limited circumstances, a "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government agency may acquire an essential service, despite the existence of a conflict, when no source other than that which triggers the conflict is available; the

rule “ensures that essential government functions are performed even where a conflict of interest exists.” (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.)

The rule of necessity has only been applied in limited situations. For example, a city could obtain emergency nighttime services from a service station owned by a member of the city council, where the town was isolated and the council member’s station was the only one in the area that was open. (4 Ops. Cal. Atty. Gen. 264 (1944).) Also, a healthcare district in a remote area could advertise its services on a local radio station, even though one of the district’s directors was employed at the station. After exploring other outlets, it was clear that the radio station was the only source that would deliver the necessary information in an efficient, cost-effective, and timely manner. (88 Ops. Cal. Atty. Gen. 106 (2005).) What these situations have in common is the exigency of the circumstances such that delaying action to contract with a non-conflicted source would be to the detriment of the affected people.

In instances such as the situation in San Joaquin, the rule of necessity would apply. Courts caution, however, that the rule is to be invoked for actual necessity, and not simply convenience. San Joaquin makes efforts to explore all other avenues in most situations, including purchasing from and contracting with larger hardware stores that are out of the area. In some situations, however, emergencies arise and Harralson’s is the only option. In the instant case, the rule of necessity would apply, allowing the city to enter into the contracts, but preventing the Mayor from participating in the decisions. (See *Eldridge, supra*, at p. 323.)

Manner of Disqualification

Section 1090 does not specify a manner of disqualification, but Section 87105 is helpful in determining how to recuse one’s self from a decision in a public meeting body held pursuant to either the Bagley-Keene Act (Section 11120 et seq.) or Brown Act (Section 54950 et seq.). (See Section 87105 and Regulation 18702.5, enclosed.) These provisions require the official to publicly identify his or her financial interest, disqualify him- or herself from participating in the matter, and leave the room during any discussion of the matter.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl

Enclosure